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The time period for reply, if any, is set in the attached communication.

RECORD OF ORAL HEARING  
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte JAMES D. KROL

Appeal 2008-1794  
Application 10/692,857  
Technology Center 1700

Oral Hearing Held: May 14, 2008

Before CHUNG K. PAK, LINDA M. GAUDETTE, and  
MICHAEL P. COLAIANNI, Administrative Patent Judges

ON BEHALF OF THE APPELLANT:  
JENNIFER A. HARCHICK, ESQUIRE  
Breiner & Breiner, LLC  
115 North Henry Street  
P.O. Box 320160  
Alexandria, Virginia 22320-0160  
(703) 684-6885

The above-entitled matter came on for hearing on Wednesday, May 14, 2008, commencing at 10:25 a.m., at the U.S. Patent and Trademark

1 Office, 600 Dulany Street, 9th Floor, Alexandria, Virginia, before Paula  
2 Lowery, Notary Registration No. 162073, Notary Public.

3 THE CLERK: Good morning. Calendar Number 19, Appeal  
4 Number 2008-1794, Ms. Harchick.

5 JUDGE PAK: Good morning, Ms. Harchick. We have a court  
6 reporter who is going to transcribe the hearing, and the transcript will  
7 become part of the record. You have 20 minutes, and you may begin any  
8 time you want.

9 MS. HARCHICK: Good morning. May it please the Court,  
10 Jennifer Harchick from Breiner & Breiner on behalf of Applicant James  
11 Krol.

12 This matter is before the Board on the rejection of claims 1  
13 through 26 under 35 USC Section 103(a) over the recipe for the crustless  
14 pizza, more particularly contained therein, the recipe for deep-dish pizza in  
15 view of the Google group disclosure.

16 The present invention is a food product for a crustless pizza and  
17 method of making the same having a base layer being a formulated flour and  
18 cheese mixture, wherein the formulated flour is a dry mixture. The food  
19 product, or crustless pizza, is lower in carbohydrates than a traditional pizza  
20 having a crust.

21 A traditional pizza has a dough crust. The food product or  
22 crustless pizza of the present invention does not have a traditional pizza  
23 dough crust and is, therefore, lower in carbohydrates.

24 Support is present in the specification at page 4, paragraph 8,  
25 and at page 7, paragraph 18, for the present invention disclosing it does not  
26 have a dough layer, and also for the definition of a dough layer in a

1 traditional pizza. Other places are also available for support in the  
2 specification.

3 By definition, a traditional pizza is an open pie made typically  
4 of thinly rolled bread dough and spread with a spiced mixture, such as of  
5 tomatoes, cheese and ground meat, and is then baked.

6 A dough is further defined as a mixture that consists essentially  
7 of flour or meal and a liquid, such as milk or water, and is thick enough to  
8 knead or roll.

9 A liquid is further defined as a substance that is free-flowing  
10 like water and is not solid or gaseous. The present invention does not  
11 include a liquid and is not a dough and therefore, does not have a dough  
12 crust like a traditional pizza.

13 JUDGE GAUDETTE: Let me ask you, the claim recites a dry  
14 mixture. By dry, could that mixture include some moisture content?  
15 Wouldn't flour have some moisture in it?

16 MS. HARCHICK: Dry is in the claim language in terms of the  
17 flour in its natural state being a dry mixture. In the natural state, it would be  
18 dry without any additional moisture added to it.

19 JUDGE GAUDETTE: But it does have some moisture.

20 MS. HARCHICK: Anything that may be in a traditional flour -  
21 - traditionally the flour when you receive it from the bag along with any  
22 other baking soda additive is a dry ingredient. It is not a liquid as in free-  
23 flowing substance like water.

24 The reference for deep-dish pizza recipe includes a base layer  
25 being made of Italian cheeses and an egg mixture. It is known in the art that  
26 this egg mixture is a liquid in nature and not dry as in the present invention.

1           The examiner argues that the egg mixture is not in the base  
2 layer, but due to the liquid nature of the egg mixture it does not stay on top  
3 of the cheeses but rather mixes with the cheese to form the base layer, being  
4 a cheese and liquid egg mixture.

5           The deep-dish pizza recipe does not disclose the base layer  
6 being a formulated flour and cheese mixture wherein the formulated flour is  
7 a dry mixture, and this is acknowledged by the examiner.

8           JUDGE GAUDETTE: Does your claim language exclude other  
9 components in the base layer? For example, claim 1 reads, "The base being  
10 a formulated flour and cheese mixture."

11           The way I understand that language, it would not be limited just  
12 to those two components.

13           MS. HARCHICK: No, "comprising" is open ended, but it also  
14 is modified by the phrase "dry mixture."

15           In the deep-dish pizza recipe, the egg mixture would not make  
16 it a dry mixture. It's liquid in nature. While the claim is open-ended that  
17 there could be other ingredients in there, it is still going to be a dry mixture  
18 if there are any other ingredients contained therein.

19           JUDGE GAUDETTE: That's just the flour that's the dry  
20 mixture, not the base that's the dry mixture.

21           MS. HARCHICK: The formulated flour is a dry mixture, yes.

22           JUDGE GAUDETTE: Right. So couldn't the base layer be a  
23 dry mixture of formulated flour and also including cheese and a liquid? The  
24 formulated flour portion of it is dry.

25           MS. HARCHICK: It is, but the base layer is the components of  
26 the formulated flour and cheese in the general claim, whereas the formulated

1 flour is a dry mixture added therein.

2           The deep-dish pizza recipe further teaches away from a dry  
3 mixture of formulated flour and cheese and specifically does not disclose  
4 any flour in the recipe. In fact, it teaches that a liquid mixture is poured over  
5 the cheeses and blends therein.

6           Because of the liquid egg mixture in the deep-dish pizza recipe,  
7 the product needs to be baked twice, first upon combination of the cheese  
8 and egg mixture, then later on after the addition of any additional  
9 ingredients.

10           The Google group disclosure does not make up for the  
11 shortcomings of the deep-dish pizza recipe. The Google group disclosure is  
12 a comment from a person on a website regarding an undefined cookbook  
13 that has been purchased.

14           The examiner relies on this reference for teaching, "There are  
15 recipes for low-carb crusts that use little flour and some whey protein in a  
16 cookbook that I bought." The phrase "little flour and some whey protein" is  
17 indefinite and vague.

18           The reference goes to low-carb crusts whereas crust in a  
19 traditional pizza is a dough crust. Therefore, the Google group disclosure  
20 does not teach a crustless pizza as the present invention.

21           There is no support or teaching or suggestion or motivation to  
22 support the examiner's further statement that since the crust is made of a  
23 little flour and protein, when referring to the Google group disclosure, it is  
24 essentially without a crust.

25           The reference specifically deals with low-carbohydrate crust  
26 and is defined earlier and includes a dough crust. No motivation to combine

1 these references is present. The mere fact that food ingredients may be  
2 combined does not make the combination thereof obvious without some  
3 teaching in the prior art to do so.

4 Accordingly, independent claims 1, 11, 16 and 22 are not  
5 obvious for the reasons set forth above.

6 Additionally, the pending claims based thereon are also not  
7 obvious for these same reasons. Applicant respectfully requests reversal of  
8 the section 103 rejection in view of the applied art. Thank you.

9 JUDGE PAK: Thank you for coming.

10 Whereupon, the proceedings at 10:33 a.m. were concluded.